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Reviving the Voting Rights Act Post-*Shelby County*: A New Standard for Vote Denial and Voter ID Law Analysis Under Section Two

by ELIZABETH CERMAK*

Introduction

The concept of the right to vote is fundamentally embedded within the notion of a democratic system of government. Democracy, “rule of the people,” exists when citizens exercise power directly or elect representatives from among themselves to form a governing body. In American democracy, the ideal is to create a “government of the people, by the people, for the people.”¹ While America is often known around the world as a “shining city on a hill”² for individual freedoms and representative government, the guaranteed right to vote has remained unclear since the drafting of our nation’s Constitution.

While “we the people” is present in all foundational texts, the right to vote is not treated as a fundamental right in the U.S. Constitution.³ The original Constitution provided for only one branch of government, the House of Representatives, to be popularly elected.⁴ Citizen voting was delegated to the states, which were granted the power to determine the “times, places and manner of holding elections.”⁵ This transfer of power allowed early states to adopt numerous and varied voting requirements such as property

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1. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

2. See Ronald Reagan, Farewell Address (Jan. 11, 1989).

3. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) (stating that “the right to vote in state elections is nowhere expressly mentioned,” however, for the first time holding that “once the franchise granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”).

4. Compare U.S. CONST. art. I, § 2 with U.S. CONST. art. I, § 3, amended by U.S. CONST. AMEND. XVII and U.S. CONST. art. II, § 1.

5. U.S. CONST. art. I, § 4.

ownership, proof of paying taxes, and religious tests.⁶ By 1807, all but five states had chosen to limit the franchise to white men exclusively.⁷ The ratification of the Fifteenth Amendment in 1870 guaranteed that “race, color, or previous condition of servitude” could no longer serve as a basis for denying the right to vote, but states nonetheless still had the power to promulgate countless requirements designed to circumvent this prohibition.⁸

Aside from the ratification of the Nineteenth Amendment, there was little effective federal intervention regarding the right to vote until after World War II.⁹ While there had been some attempts to remedy the disenfranchisement experienced by African Americans, it wasn’t until 1965 that Congress acted on its power to make or alter State election regulations by passing the Voting Rights Act (“VRA”).¹⁰ Decisively inserting federal power into election regulation, the VRA outlawed literacy tests, authorized federal examiners to enroll voters, and, under section 5 of the Act, required “covered jurisdictions”—identified by their historic use of “now illegal tests plus low voter turnout” by a formula contained in section 4(b)¹¹—to obtain federal “preclearance” before they could change electoral rules and procedures.¹² These additional protections against discriminatory state election regulations immediately contributed to a substantial increase in African-American voting.¹³

The VRA was an undeniable success in this regard. In 1965, the gap in voter registration between white and African American residents of the six

6. See Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 6, 1510–12 (2002).

7. See Briffault, *supra* note 6.

8. Poll taxes, cumulative poll taxes, literacy tests, lengthy residence requirements, elaborate registration systems, and disenfranchisement due to conviction of several petty crimes are among some examples. See Briffault, *supra* note 6, at 1515.

9. The Nineteenth Amendment, ratified in 1920, granted American women the right to vote. See Briffault, *supra* note 6, at 1520.

10. U.S. CONST. art. I, § 4 (“... but the Congress may at any time by Law make or alter such Regulations. . . .”)

11. The formula in § 4(b) currently provides that States or political subdivisions of a State would be subject to the § 5 preclearance requirement if it had both: (1) a “test or device” restricting the opportunity to register and vote in November of 1972 and (2) either less than 50% of persons of voting age registered to vote or less than 50% voter turnout in the 1972 election. See Voting Rights Act of 1965 § 4(b) (current version at 52 U.S.C. § 10303(b) (2017)).

12. See Briffault, *supra* note 6, at 1520.

13. Briffault, *supra* note 6, at 1521.

states originally covered by section 5 ranged from 22.8% to 63.2%.¹⁴ By 2004, this gap had closed to -3.8% (meaning there was a higher percentage of African-Americans registered to vote than whites in some states) to 10.8%. In the 2004 election, African-American voter turnout actually “exceeded white voter turnout in five of the [original] six states.”¹⁵

In *Shelby County v. Holder*, Chief Justice Roberts acknowledged these facts by stating there was “no doubt” the “remarkable” improvements in African-American voter registration and turnout were “in large part *because of the Voting Rights Act*.”¹⁶ However, it was also precisely due to these improvements that the *Shelby* court ultimately concluded that the section 4(b) formula had become an unconstitutional extension of federal power.¹⁷ Citing the data mentioned above, Roberts felt troubled that the coverage formula had not been adjusted to recognize “today’s statistics.”¹⁸ With an unusual judicial chastisement of Congressional inaction, the majority opinion found that Congress’ failure to update the formula left them “with no choice but to declare section 4(b) unconstitutional.”¹⁹ While the rest of the VRA was left intact, the formula that had given life to section 5 could no longer be used as a basis for subjecting jurisdictions to its preclearance requirements.

The three years between the *Shelby* decision and the 2016 presidential election demonstrated the dramatic impact of freeing states from section 5’s preclearance provision. Between 2013 and Election Day 2016, states across the country were able to pass or update a wide variety of election laws with far less accountability than they had been subject to in the pre-*Shelby* era.²⁰ Some of the most controversial election laws passed, updated, or tightened during the post-*Shelby* time are commonly known as “voter ID” laws, and require voters to present some form of identification before they cast a ballot. Voter ID laws generally require voters to attain a government-issued ID, at

14. See S. REP. NO. 109–295, at 11 (2006); H.R. REP. NO. 109–478, at 12 (2006). For example, in 1965, 69.9% of white residents of Mississippi were registered to vote compared to only 6.7% of African Americans, creating a gap of 63.2%.

15. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2626 (2013) (citing DEPT. OF COMMERCE, CENSUS BUREAU, REPORTED VOTING AND REGISTRATION, BY SEX, RACE AND HISPANIC ORIGIN, FOR STATES (Table 4b)).

16. *Id.*

17. *Id.* at 2631.

18. See *id.* at 2630–31.

19. *Id.* at 2631.

20. See, e.g., Tomas Lopez, ‘Shelby County’: One Year Later, BRENNAN CTR. FOR JUST. (June 24, 2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later>; *Election 2016: Restrictive Voting Laws by the Numbers*, BRENNAN CTR. FOR JUST. (Sept. 28, 2016), <http://www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers>.

their own cost, as a precondition to accessing the ballot. As anyone who has been to the DMV or passport office has experienced, getting an ID card can be time consuming, creating a special hardship for the elderly, disabled, and working poor. These laws were immediately recognized as hurdles to the voter for minorities and low-income communities. Although the findings have been disputed, several studies have demonstrated that these populations were “especially prone to not having proper identification.”²¹ There has been a great deal of litigation over challenges to these laws since 2013, but the combined effect of the Court’s decision in *Crawford v. Marion County Elections Board*²² and the uncertain standard for bringing a vote denial claim under the remaining VRA provisions post-*Shelby* has led to inconsistent and unsatisfactory judicial results for those concerned about voter access.²³ In the wake of the 2016 election and the countless allegations of voter fraud, election rigging, and vote denial, it is imperative to articulate a new, clear, and workable judicial standard to evaluate voting access in future elections.

Through an analysis of the current judicial atmosphere and remaining legal methodologies pertaining to protecting the right to vote, this Note proposes a new workable standard for evaluating claims of vote denial and voter suppression under section 2 of the VRA. Since the obstacles to successfully challenging voter ID laws under an equal protection analysis are unlikely to be overcome in the short term,²⁴ this Note demonstrates that the VRA still provides the best available legal strategy for voting rights advocates. Although the majority of section 2 jurisprudence addresses issues

21. Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. OF AM. POL. 363, 363–65 (April 2017) [hereinafter *Voter Identification Laws and the Suppression of Minority Votes*] (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-634, ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS (2014) and BRENNAN CTR. FOR JUST., CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION (2006)).

22. *Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181 (2008) (finding that a state’s interest in preventing in-person voter fraud, even when there is little to no evidence of its occurrence within the State, is sufficient rationale to overcome the burdens placed on voters by mandating they obtain State-issued photo identification).

23. *Compare* Ohio State Conference of the NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio), *aff’d*, 768 F.3d 524 (6th Cir. 2014), *stay granted*, 135 S. Ct. 42 (2014), *vacated sub nom.* Ohio State Conference of the NAACP v. Husted, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014), *and* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014), *and* Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014); *with* Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis.), *rev’d*, 768 F.3d 744 (7th Cir. 2014) *and* Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. Dec. 13, 2016).

24. See *Crawford*, 553 U.S. at 194–95.

of vote dilution rather than vote denial,²⁵ this Note nonetheless demonstrates that it can be effectively applied to all forms of voter disenfranchisement. This Note surveys recent court decisions regarding voter ID and vote denial claims brought under section 2,²⁶ and concludes that federal courts have begun to coalesce around a standard for their analysis. To address several remaining issues that the judicially agreed upon aspects of this test leave unresolved, this Note reviews two proposals put forward in law review publications for additional suggestions. Finally, by combining the agreed upon aspects of the test with a method for introducing evidence of implicit bias and demonstrating the state's interest in regulating voting, this Note offers a new judicial standard that provides both sides of the voter ID debate an equal opportunity to be heard.

I. Challenges to Voter ID Laws Under the Equal Protection Clause Are Not Currently Viable

The only time the United States Supreme Court has considered a challenge to a voter ID law was in the 2008 case of *Crawford v. Marion County Elections Board*.²⁷ Although the claim was not brought under a provision of the Voting Rights Act and the case itself produced a plurality opinion, a majority of Justices did agree on a legal standard for vote denial claims under the Equal Protection Clause.²⁸ Justice Stevens' opinion, which was joined by Chief Justice Roberts and Justice Kennedy, applied a "balancing test" derived from *Anderson v. Celebrezze*²⁹ and *Burdick v. Takushi*³⁰ to uphold Indiana's voter ID law.³¹ This "balancing standard" was

25. Prior to *Shelby*, the majority of cases brought under section 2 of the VRA addressed vote dilution rather than vote denial. In 1982, Congress even specifically amended section 2 to address the "broad array of dilution schemes" that had been "employed to cancel the impact of the . . . black vote." S. REP. NO. 97-417, at 6 (1982).

26. See Jaime Fuller, *How has Voting Changed Since Shelby County v. Holder?*, WASH. POST (July 7, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/>.

27. *Crawford*, 553 U.S. at 181 (2008).

28. *Id.* at 210–11 (Souter, J., dissenting) (stating that the lead opinion does not disavow the basic principles of a "sliding scale balancing analysis" supported by Justice Souter's dissent, but that "it does not insist enough on the hard facts that [the] standard of review demands"); see Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 470 (2015) (pointing out that Justice Souter and Justice Steven applied the same balancing test, differing only in the way they applied that standard to the facts).

29. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

30. *Burdick v. Takushi*, 504 U.S. 428 (1992).

31. *Crawford*, 553 U.S. at 190 (lead opinion of Stevens, J.) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

also embraced by Justice Souter, who authored a dissent joined by Justice Ginsburg that likewise balanced the burdens on voting against the benefits of the law to the state.³² The key difference between Justice Stevens and Justice Souter was their evaluation of the weight of the law's burdens and benefits. Justice Souter applied the same standard as the lead opinion, yet he found the burdens on voting heavier and the state's justifications less significant than Justice Stevens.³³ Since Justice Breyer wrote a solitary dissent that also balanced the burdens on voting against the benefits of the law,³⁴ six Justices in *Crawford* agreed that a balancing standard should govern equal protection challenges to burdens on electoral participation.³⁵

Under the *Anderson-Burdick* balancing test applied in *Crawford*, a court evaluating a vote denial claim brought under the Equal Protection Clause must weigh the "character and magnitude" of the burden on voting,³⁶ "however slight [it] may appear"³⁷ against the "precise interest put forward by the State as justifications for the burden."³⁸ When the burden on voting is found to be "severe," then strict scrutiny will apply.³⁹ Lesser burdens require a less weighty interest, and along with even "reasonable, nondiscriminatory restrictions,"⁴⁰ will be balanced against the state's "important regulatory interests."⁴¹ Since the right to vote itself is anchored in "the protected right . . . to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population,"⁴² the Equal Protection Clause and thus the *Anderson-Burdick* balancing test is invoked even in the case of nondiscriminatory restrictions on the right to vote.⁴³

32. See *id.* at 209–11 (Souter, J., dissenting).

33. See *Crawford*, 553 U.S. at 190; see also Tokaji, *supra* note 28.

34. See *Crawford*, 553 U.S. at 237 (Breyer, J., dissenting).

35. See Tokaji, *supra* note 28.

36. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 789).

37. *Crawford*, 553 U.S. at 191.

38. *Id.* at 190 (quoting *Burdick*, 504 U.S. at 434); Tokaji, *supra* note 28, at 470.

39. *Crawford*, 553 U.S. at 190.

40. *Id.* (quoting *Burdick*, 504 U.S. at 434).

41. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

42. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36, n.78 (1973).

43. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"); *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (before the right to vote can be restricted, the purpose of the restrictions and the asserted overriding interests served by it must meet close constitutional scrutiny); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665

The *Crawford* lead opinion's finding that Indiana had a legitimate state interest in preventing in-person voter fraud,⁴⁴ particularly given the recognition that the "record contains no evidence of any such fraud actually occurring in Indiana at any time in its history,"⁴⁵ is of great import to future challenges to voter ID laws.⁴⁶ In justifying Indiana's interest in preventing in-person voter fraud, Justice Stevens cited, "flagrant examples of [in person voter] fraud in other parts of the country . . . documented throughout this Nation's history" and "occasional examples" that "have surfaced in recent years"⁴⁷ as proof that "not only is the risk of voter fraud real" but that it could also "affect the outcome of a close election."⁴⁸ The use of evidence from other states to justify an Indiana election law is questionable given the Court's previous assertion that vote denial claims require an "intensely local appraisal"⁴⁹ of the challenged practices. If, *arguendo*, the requirement of an "intensely local appraisal" applies to vote denial claims brought under the Equal Protection Clause as well as claims brought under section 2 of the VRA, it would render Stevens' argument tenuous at best. His argument becomes even more attenuated when viewed in light of the accompanying footnote 11 (which cites "infamous examples" of in-person voter impersonation "in the New York City elections of the late 19th century" as support)⁵⁰ and footnote 12 (which, when read in its entirety, claims that there are "scattered instances of in-person voter fraud" but cites only one confirmed individual of committing it).⁵¹ Despite the weak evidence and its even weaker link to a voter ID law in Indiana, the current Court is unlikely to be persuaded to overrule the decision anytime soon. Since the *Anderson-Burdick* test allows non-severe burdens on voting to be justified by less important state regulatory interests, the *Crawford* Court's assignment of weight to the prevention of non-occurring voter fraud is virtually crippling

(1966) ("once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment").

44. See *Crawford*, 553 U.S. at 194–95.

45. *Id.* at 194.

46. See Jani Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 638, n.289 (2013).

47. *Crawford*, 553 U.S. at 195.

48. *Id.* at 196.

49. *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986) (quoting *White v. Regester*, 412 U.S. 755, 769 (1973)) (holding, in part, that vote dilution claims brought under § 2 of the Voting Rights Act require an "intensely local appraisal" of context, including nine factors listed in a Senate Report regarding the 1982 Amendments to the VRA); see Tokaji, *supra* note 28, at 446.

50. *Crawford*, 553 U.S. 195, n.11.

51. *Id.* at n.12.

to equal protection challenges to voter ID laws. It is thus highly doubtful that *Crawford* can be overturned and any challenge to a voter ID law could be successful under the Equal Protection Clause in the near future.

II. The Voting Rights Act Still Provides the Best Protection for Voters

Due to the obstacles created by the *Crawford* decision, lawyers and activists desiring to challenge voter ID laws for illegally burdening or denying the right to vote turned their focus from the Equal Protection Clause to the Voting Rights Act. Prior to 2013, section 5 of the VRA had required all changes to voting standards, practices, or procedures in states and political subdivisions of a state which met the criteria provided by section 4(b)⁵² to be submitted for federal review and preclearance prior to implementation.⁵³ The federal review took place before a three-judge panel or through an administrative submission to the U.S. Attorney General, and any proposed changes to election procedure that were proven to have the purpose or effect of denying or abridging the right to vote on account of race or color would be denied preclearance.⁵⁴ These preclearance proceedings were successfully used to challenge proposed voter ID laws in Texas, Florida, South Carolina, and New Hampshire.⁵⁵ The Supreme Court's decision in *Shelby County v. Holder*,⁵⁶ however, effectively put an end to this strategy.

The ability to use section 5 has always been limited to claims arising within States and "political subdivisions" in which "the prohibitions set forth in section 4(a) are in effect."⁵⁷ Since section 4(a) only applies to States brought under its provisions by the formula in section 4(b),⁵⁸ it is clear that section 5 has always been intimately linked to the coverage formula in section 4(b). Thus, when the *Shelby* Court ruled that section 4(b) of the VRA

52. The coverage formula of § 4(b) of the VRA, the provision found unconstitutional by *Shelby County v. Holder*, provided that States or "political subdivision of a State" would be brought under the federal oversight of § 5 if "the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972." 52 U.S.C. § 10303(b) (2016).

53. Voting Rights Act of 1965, § 5; 52 U.S.C. § 10304 (2016).

54. See Voting Rights Act of 1965, § 4(a); 52 U.S.C. § 10303(a) (2016).

55. Nelson, *supra* note 46, at n.32.

56. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

57. Voting Rights Act of 1965, § 5; 52 U.S.C. § 10304 (2016).

58. Voting Rights Act of 1965 § 4(a); 52 U.S.C. § 10303(a) (2016).

was unconstitutional, it also effectively nullified section 5 and the ability to challenge laws and practices that would burden the right to vote using preclearance procedures. As a direct result, vote denial jurisprudence under the VRA, and therefore also the legal strategy for challenging voter ID laws, was completely altered yet again.⁵⁹

After the *Shelby* decision, the focus of vote denial claims was forced to shift to the protection provided by section 2 of the VRA.⁶⁰ This has presented a host of new obstacles for the legal community. Between 1982 and 2013, section 2 had primarily been used to challenge claims of minority vote dilution.⁶¹ More specifically, there were a total of three hundred twenty-two lawsuits involving section 2 claims during that period for which rulings are available, and two hundred sixty-six of those can be safely characterized as vote dilution rather than vote denial cases.⁶² As a result, the primary precedents currently guiding courts in their evaluation of section 2 vote denial claims are the methods used to assess vote dilution claims. The Supreme Court has yet to consider a case involving a section 2 vote denial claim, and thus there is currently no universal standard that lower courts must follow. Developing suggestions for a universal standard for section 2 vote denial claims has become the subject of many academic writings, and any

59. See Jessica Cassella, *Using Section 2 of the Voting Rights Act to Fight Voter Suppression Tactics After Shelby County v. Holder Without a New Section 4(b) Formula*, 42 HASTINGS CONST. L.Q. 161, 162 (2014).

60. Tokaji, *supra* note 28, at 440. Section two of the VRA provides that “no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth [for language minorities].” A violation is “established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. 10301.

61. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 708 (2006) [hereinafter *The New Vote Denial*].

62. *Id.* at 708–09 (citing Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act since 1982*, 39 U. MICH. J.L. REFORM 643 (2006)). Vote dilution refers to the use of practices, such as redistricting, that minimize the voting strength of racial or other minorities. As described by the Supreme Court, the essence of a vote dilution claim “is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Vote denial is the practice of outright denying an individual the right to vote through the use of a test, device, or procedural mechanism, such as literacy tests.

attempt to make a further suggestion on the topic must begin with an understanding of the current state of the section 2 standard.

A. Section Two Jurisprudence Applies to All Forms of Voting Discrimination

The original version of section 2 of the VRA stated that “no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁶³ This text was modeled directly after the language of the Fifteenth Amendment, which provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”⁶⁴ Despite its plurality opinion in *City of Mobile v. Bolden*,⁶⁵ a majority of the Supreme Court held that the protection offered by the Constitution, and therefore section 2,⁶⁶ reached “only intentional race discrimination.”⁶⁷ Accordingly, to succeed in a section 2 claim against a voting law or procedure after *Bolden*, a plaintiff was required to prove that it was enacted or maintained to intentionally discriminate against a racial classification.

In a direct response to the Court’s decision in *Bolden*, Congress amended the language of section 2 to overrule the intent requirement.⁶⁸ In the 1982 Amendments to the VRA, Congress changed section 2 to allow plaintiffs to “establish a violation of the section if the evidence established that, in the context of the ‘totality of the circumstance of the local electoral process,’ the standard, practice or procedure . . . had the result of denying a racial or language minority an equal opportunity to participate in the political process.”⁶⁹ Section 2(a) of the VRA currently reads:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political

63. Voting Rights Act of 1965 § 2; 52 U.S.C. § 10301 (2016).

64. U.S. CONST. amend. XV.

65. *Mobile v. Bolden*, 446 U.S. 55 (1980).

66. *Bolden*, 446 U.S. at 560–61 (“It is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and . . . was intended to have an effect no different from that of the Fifteenth Amendment itself.”).

67. Tokaji, *supra* note 28, at 443.

68. Tokaji, *supra* note 28, at 443.

69. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., SECTION 4 OF THE VOTING RIGHTS ACT, <https://www.justice.gov/crt/section-2-voting-rights-act> (Dec. 15, 2016); see Cassella, *supra* note 59, at 162.

subdivision in a manner which *results* in a denial or abridgement of the right of any citizens of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).⁷⁰

While the text of the amended VRA did not list the factors that should be considered under section 2(b)'s "totality of the circumstances" language, a Senate Judiciary Committee Report on the history of the amendments listed nine factors ("Senate Factors") for courts to consider.⁷¹ These factors, later used and adopted by the Supreme Court in *Thornburg v. Gingles*,⁷² include:

1. The history of voting-related discrimination in the State or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which members of the minority group have been elected to public office in the jurisdiction;
8. Whether political campaigns have been characterized by overt or subtle racial appeals;
9. Whether the policy underlying the state or political subdivision's use of such voting qualification,

70. Voting Rights Act of 1965, § 2(a); 52 U.S.C. § 10301(a) (2017). Note that § 10303(f)(2) was previously known as VRA § 4(f)(2).

71. S. REP. NO. 97-417, at 27 (1982).

72. *Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986).

prerequisite to voting, or standard, practice or procedure is tenuous.⁷³

The Senate Report made clear that there should be “no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.”⁷⁴ The list was not meant to be either comprehensive or exclusive,⁷⁵ and the “ultimate test” for a section 2 violation was stated to be “whether, in the particular situation, the [challenged] practice operated to deny the minority plaintiff[s] an equal opportunity to participate and to elect candidates of their choice.”⁷⁶

The majority’s opinion in *Gingles* provides important and enlightening tools for conceptualizing an analytic framework for section 2 vote denial claims.⁷⁷ In adopting the Senate Factors as part of their analysis of vote dilution claims, the *Gingles* majority emphasized that any complaint brought under section 2 demanded an “intensely local appraisal” of the challenged practices.⁷⁸ Justice Brennan’s majority opinion also articulated the “core principle”⁷⁹ that “the essence of a [section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”⁸⁰ Lastly, and perhaps most important to the development of a legal standard for evaluating section 2 vote denial claims, this language in the *Gingles* opinion leaves no doubt that the Court sees the resulting test as applying to all forms of voting discrimination, not just vote dilution.⁸¹

B. There Has Been a Substantial Coalesce Among Federal Courts Regarding a Section Two Vote Denial Standard

Lower courts have struggled to find a universal legal standard for evaluating vote denial claims under section 2 in the wake of *Shelby*, leading

73. S. REP. NO. 97-417, at 28–29 (1982).

74. S. REP. NO. 97-417, at 29 (1982).

75. Tokaji, *supra* note 28, at 444.

76. S. REP. NO. 97-417, at 29.

77. See Nelson, *supra* note 46, at 595–96; see also Tokaji, *supra* note 28, at 446.

78. Thornburg v. Gingles, 478 U.S. 30, 78 (1986) (quoting White v. Regester, 412 U.S. 755, 769 (1973)); see Tokaji, *supra* note 28, at 446.

79. Tokaji, *supra* note 28, at 445.

80. *Gingles*, 478 U.S. at 47.

81. Tokaji, *supra* note 28, at 446.

to variation in the way the VRA has been enforced.⁸² Looking to past and recent cases for guidance on how to apply section 2 to vote denial, the reason for this confusion is apparent. While some courts have used a proximate causation test,⁸³ others have required a showing of intentional discrimination.⁸⁴ A majority of courts have agreed, however, on a contextual approach that draws on the nine Senate Factors endorsed in *Gingles*,⁸⁵ with particular focus on “social historical inequalities that interact with the challenged practice to result in the disproportionate denial of minority votes.”⁸⁶ After a threshold showing of causation has been established with proof that the challenged practice has a disparate impact on racial minorities,⁸⁷ this majority approach then proceeds to an analysis of the Senate Factors to determine if there is sufficient interaction with social and historical inequalities.

There are three federal courts that have recently agreed on a test for section 2 vote denial claims, and a close reading of other lower courts (with the exception of the Seventh Circuit) shows “substantial agreement” on the standard that should govern section 2 vote denial claims.⁸⁸ In *Ohio State Conference of the NAACP v. Husted*,⁸⁹ the Sixth Circuit articulated two elements required by section 2 to prove vote denial: (1) that the challenged practice imposes a “discriminatory burden” on a protected class; and (2) that the burden is “caused by or linked to” “social and historical conditions” that

82. Compare *Ohio State Conference of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio), *aff’d*, 768 F.3d 524 (6th Cir. 2014), *stay granted*, 135 S. Ct. 42 (2014), *vacated sub nom.* *Ohio State Conference of the NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014), and *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), and *Veasey v. Perry*, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014); with *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis.), *rev’d*, 768 F.3d 744 (7th Cir. 2014) and *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. Dec. 13, 2016).

83. See, e.g., *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997); *Ortiz v. City of Phila.*, 28 F.3d 306, 321 (3d Cir. 1994).

84. See, e.g., *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1245–49 (M.D. Fla. 2012) (requiring proof of intentional discrimination by public actors to prevail on a § 2 denial claim); *Farrakhan v. Gregoire*, 623 F.3d 990, 993–94 (9th Cir. 2010) (en banc).

85. See S. REP. NO. 97-417, at 28–29; see also *Gingles*, 478 U.S. at 44–45.

86. Tokaji, *supra* note 28, at 448 (citing *Stewart v. Blackwell*, 444 F.3d 843, 851 (6th Cir. 2006), *vacated by* 473 F.3d 692 (6th Cir. 2007) (en banc) (“most courts, however, take a contextual approach that draws on the Senate factors . . .”).

87. Tokaji, *supra* note 28, at 454; see generally *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (en banc).

88. Tokaji, *supra* note 28, at 445.

89. *Ohio State Conference of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio), *aff’d*, 768 F.3d 524 (6th Cir. 2014), *stay granted*, 135 S. Ct. 42 (2014), *vacated sub nom.* *Ohio State Conference of the NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

have or currently produce discrimination against members of the protected class.⁹⁰ For the first element, the court evaluated how minorities fared against a new burden as “compared to other groups of voters”⁹¹ rather than as compared to past practices (as had been required under section 5). This decision and test was subsequently followed by the Fourth Circuit and a federal district court in Texas.⁹² Additionally, in *Frank v. Walker*,⁹³ the analysis adopted by the district court was functionally similar to that of the Fourth and Sixth Circuits despite the fact that the two-part test was not expressly adopted.⁹⁴ However, the Seventh Circuit later reversed the *Frank v. Walker* district court opinion, expressing skepticism regarding the second part of the test adopted from the Fourth and Sixth Circuits (that the burden must be linked to ‘social and historical conditions’ that have or currently ‘produce discrimination’) because discrimination “by the defendants”⁹⁵ had not been required.⁹⁶ Despite the potential additional hurdles this Seventh Circuit decision poses for future claims, it can still be said that four separate federal courts have used the same test to analyze a section 2 vote denial claim.

Notwithstanding this relative coalescing of standards, there remain two key areas of disagreement among courts in their pre-2014 decisions that have yet to be resolved: (1) the meaning of causation in a section 2 vote denial claim, including whether it requires a showing of racially discriminatory intent from the defendants;⁹⁷ and (2) what social-historical conditions must be shown.⁹⁸ Concerning to the first issue, there appears to be a general consensus that some showing of causation is required to prevail on a section 2 claim, however there has been disagreement over what needs to be shown to satisfy it.⁹⁹ Some courts have understood it to require a *Washington v. Davis* level of “discriminatory intent,”¹⁰⁰ while others have simply required

90. *Husted*, 768 F.3d at 554 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

91. *Husted*, 768 F.3d at 556.

92. See *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Perry*, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014).

93. *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014).

94. See *Tokaji*, *supra* note 28, at 460.

95. *Frank*, 768 F.3d at 755 (emphasis added).

96. *Tokaji*, *supra* note 28, at 461.

97. *Tokaji*, *supra* note 28, at 451.

98. *Tokaji*, *supra* note 28, at 448.

99. *Tokaji*, *supra* note 28, at 451.

100. See generally *Washington v. Davis*, 426 U.S. 239, 241 (1976); see also *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1244 (M.D. Fla. 2012) (stating explicitly that section 2 plaintiffs must show intentional discrimination either by public officials or private actors in the form of “racial bias in the community”); *Ortiz v. City of Phila. Office of the City Comm’rs Voter Registration Div.*, 28

that the challenged practice be a “*but-for* cause of a disproportionate burden”¹⁰¹ on minority voters.¹⁰² In terms of the kind of social-historical conditions that must be demonstrated, most courts rely on the Senate Factors for guidance.¹⁰³ Absent a decision from the Supreme Court regarding the standard for causation in a section 2 claim, however, it is unclear how helpful evidence of the Senate Factors will be.¹⁰⁴ Both of these issues will have to be addressed and resolved in any proposal for a universal section 2 vote denial standard.

III. Approaches to Creating a Better Legal Standard

The main obstacle to creating a workable standard for vote denial claims is reconciling the Supreme Court’s requirement that the claim be proven with something more than disparate impact with section 2’s purposeful exclusion of an intent requirement.¹⁰⁵ There have been some indications from the Court that, absent a valid defense on behalf of State actors,¹⁰⁶ they may view remedial efforts based solely on a racially disparate impact as the equivalent of reverse racial discrimination and thus a violation of the Equal Protection Clause.¹⁰⁷ Although the Court ultimately declined to

F.3d 306, 312 (3rd Cir. 1994) (stating that “section 2 plaintiff must show a causal connection between the challenged voting practice and the prohibited discriminatory result” while simultaneously not finding evidence that African-American and Latino voters were affected by voter purges at higher rates than white voters sufficient for showing a causal connection between the challenged purge and registration disparities).

101. Tokaji, *supra* note 28, at 451.

102. See *Gonzalez v. Arizona*, 677 F.3d 383, 406–07 (9th Cir. 2012) (en banc) (challenge to Arizona’s voter ID law rejected primarily due to a failure to prove but-for causation); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1375 (N.D. Ga. 2005) (finding that plaintiffs had failed to show a substantial likelihood of success in their § 2 challenge to Georgia’s voter ID law because, although they produced evidence of racial disparities in wealth and access to vehicles, they had not shown evidence of racial disparities in the possession of driver’s licenses or other forms of photo ID).

103. Tokaji, *supra* note 28, at 454.

104. Tokaji, *supra* note 28, at 455 (“[I]s it enough to demonstrate underlying inequalities (in socioeconomic status, for example) that correlate with race? Or are these ‘soft purpose’ factors designed to get at intentional discrimination on the part of either public or private actors?”).

105. Nelson, *supra* note 46, at 612.

106. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (explaining that because the City of New Haven’s hearings regarding the racially disproportionate exam results of a test to become a firefighter produced no strong evidence of a disparate-impact violation under Title VII, the City was not entitled to throw out those results based solely on the racial disparity).

107. *Cf. id.* (“[B]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”).

address this constitutional question, Justice Kennedy's majority opinion in *Ricci v. DeStefano*¹⁰⁸ clearly indicated that the Court saw a tension between the constitution and statutes containing disparate impact provisions.¹⁰⁹ The Court had previously issued a similar, although far less explicit, warning regarding the VRA.¹¹⁰ This trajectory suggests "an outlook that laws that prohibit disparate impact 'are constitutional only if those impacts can be shown to reflect a racially-discriminatory purpose.'"¹¹¹ At a minimum, however, *Ricci* suggests that the Court will narrowly construe statutory disparate impact provisions to avoid constitutional conflicts unless there is a sufficient causal link between the challenged practice and the disproportionate harm.

The tension between the Equal Protection Clause and a pure disparate impact standard demands a careful investigation into what, other than an intent to discriminate based on race, can prove that disparate vote denial is "on account of race" as is required by the language of section 2.¹¹² The fifth Senate Factor is particularly instructive in this regard, suggesting an examination of the extent to which members of the minority group "bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process."¹¹³ This factor recognizes the important reality that a neutral voting practice or procedure can still produce a discriminatory result in electoral participation when it exists in a particular context of racial inequality and implicit bias.¹¹⁴

In addition to surmounting the obstacle of an unclear causation standard presented by an apparent constitutional need for more than evidence of disparate impact and section 2's purposeful exclusion of an intent

108. *Ricci*, 557 U.S. 557.

109. *Id.* at 593.

110. Nelson, *supra* note 46, at 612 (citing *Gingles*, 478 U.S. at 47 (stating that multimember districts and at-large elections do not *per se* violate minority voters' rights, it must still be proven that the electoral structure at issue operates to minimize or cancel out their ability to elect their preferred candidates)).

111. Nelson, *supra* note 46, at 612 (citing Rick Pildes, *How Ricci Will Affect the Voting Rights Act*, BALKINIZATION (June 29, 2009), <http://balkin.blogspot.com/2009/06/how-ricci-will-affect-voting-rights-act.html>) ("[I]t would be unconstitutional for Congress to make disparate impacts illegal if they cannot be shown to reflect an underlying discriminatory purpose. That is, impact can be looked to . . . as evidence of purpose. . . . But impact alone cannot be a constitutional basis for making a state law/practice illegal.").

112. Nelson, *supra* note 46, at 612.

113. S. REP. NO. 97-417, at 29 (1981-1982); see *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

114. Nelson, *supra* note 46, at 618.

requirement, Daniel Tokaji has convincingly argued that a good section 2 vote denial test should: (1) be faithful to the VRA's text and congressional intent; (2) offer an administrable doctrinal structure; (3) not be too complex or vague; (4) make room for the State to offer justifications for its voting restrictions as the Court indicated it should be allowed to do in *Crawford*;¹¹⁵ and (5) keep within the boundaries of Congress' enforcement powers.¹¹⁶ Any proposed test for a section 2 vote denial claim should, however, be critiqued based on the other four standards.

A. Current Proposals for a Section Two Vote Denial Standard Are Insufficient

There have been several different types of tests for section 2 vote denial claims put forth in scholarly journals. The first type might be labeled as *burden-shifting*, and suggests that the plaintiff should have the "initial burden of showing both that the challenged practice results in the disproportionate denial of minority votes, and that the disparate impact is traceable to the challenged practice's interaction with social and historical conditions."¹¹⁷ The second is the *causation and impact-plus* test, which recommends a "sort of under-the-table balancing" of the State's interest in the challenged practice "against its vote denying impact" that "allow[s]

115. See generally *Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 189–91 (2008) (articulating the *Anderson-Burdick* balancing test).

116. Tokaji, *supra* note 28, at 467–68. There are many arguments both supporting and challenging the constitutionality of the VRA that have been extensively written about and will not be reviewed or repeated here. See, e.g., Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1393 (2010); Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 15 (1965); Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 701 (2009); Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 927 (2011); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 3–4 (2007); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 731–41 (1998); Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2361 (2003); Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 47–48 (2006); Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 187–88 (2005); Jennifer C. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne*, 59 N.Y.U. ANN. SURV. AM. L. 609, 614 (2004); Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1202 (2012).

117. Tokaji, *supra* note 28, at 447.

judges to consider the justifications the government proffers for adopting or keeping the voting practice in question.”¹¹⁸ A third proposed test has been called *quasi-intent*, and proposes that plaintiff should be “required to prove ‘to a significant likelihood’ that the electoral inequality is traceable to race-based decision making . . . on the part of either traditional public actors (like legislators or election officials) or by voters.”¹¹⁹ The fourth test, the *inverse relation* test, suggests that “the more severe the racial disparity of voting access that results from a challenged practice, the more tenuous the justification should be seen to be, even if that justification is asserted to have nothing to do with race.”¹²⁰ The two most compelling tests, however, have been those offered by Daniel Tokaji and Janai Nelson, the Associate Director-Counsel of the NAACP Legal Defense and Educational Fund.

In his 2015 article *Applying Section 2 to the New Vote Denial*, Tokaji proposes a three-part test for section 2 vote denial claims alleging a burden on voting:

1. Plaintiff must show that the challenged standard, practice, or procedure causes a disproportionate burden on members of a protected class that an alternative standard, practice, or procedure would avoid;
2. Plaintiffs must show that the disproportionate burden is traceable to interaction of the challenged standard, practice or procedure with ‘social and historical conditions’ that have produced or currently produce discrimination against members of the protected class;
3. If the plaintiffs satisfy (1) and (2), then the defendants must show by clear and convincing evidence that the burden on voting is outweighed by the state interests in the challenged standard, practice, or procedure.¹²¹

118. Nelson, *supra* note 46, at 613–14 (quoting *The New Vote Denial*, *supra* note 61, at 722).

119. Tokaji, *supra* note 28, at 447 (quoting Christopher Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PENN. L. REV. 377, 399–403 (2012)).

120. Nelson, *supra* note 46, at 614 (quoting Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171, 1199 (2001)).

121. Tokaji, *supra* note 28, at 474.

This test is largely based on the two-step test used by the Sixth Circuit in *Ohio State Conference of the NAACP v. Husted*,¹²² however adds a third element.¹²³

Tokaji's concern with giving the state the ability to justify an election practice when it only slightly burdens voters contrasts sharply with the primary focus of Nelson's proposed test. Concentrating on what she calls the "theory of causal context,"¹²⁴ Nelson suggests an analysis that does not necessarily require direct causation, but instead "recognizes that the nexus between the harm and the instrument is not necessarily linear"¹²⁵ when it comes to explaining racially disparate impacts of election practices. Through analyzing the environment within which a vote denial claim arises, her *causal context* test seeks to legally incorporate the way "coexisting and mutually reinforcing factors"¹²⁶ and "persistent racial inequality" outside of an electoral context can interact with "race-neutral" election laws to cause disparate vote denial.¹²⁷ In a causal context analysis, an electoral practice will be found to deny or abridge the right to vote "on account of race"¹²⁸ in violation of section 2 if it produces (1) a "statistically significant"¹²⁹ disparate impact that is (2) "because of racial inequality inside or outside the electoral arena that (3) interacts with the practice to reproduce racial disparities within the electoral arena."¹³⁰ To succeed in a section 2 vote denial claim under Nelson's test, plaintiffs are thus required to offer proof that "racial inequality has permeated the electoral arena."¹³¹

Nelson offers compelling arguments that a contextual approach to section 2 claims is necessary to effectively enforce the VRA and convincing evidence that her model fits within and draws from existing precedent. She

122. See *Ohio State Conf. of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio), *aff'd*, 768 F.3d 524 (6th Cir.), *stay granted*, 135 S. Ct. 42 (2014).

123. The additional third prong, as quoted here, is different from Tokaji's original suggestion in a 2006 article, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, where he proposed that strict scrutiny should apply after the first two steps. Tokaji, *supra* note 61, at 724–26. This change, he says in a later article, was done mainly "to make it easier for the state or local jurisdiction to justify its challenged practice where the burden on participation is modest." Tokaji, *supra* note 61, at 474.

124. Nelson, *supra* note 46, at 618–619.

125. Nelson, *supra* note 46, at 618.

126. Nelson, *supra* note 46, at 618.

127. Nelson, *supra* note 46, at 586.

128. Voting Rights Act of 1965, § 2; 52 U.S.C. § 10301 (2016).

129. Nelson, *supra* note 46, at n.202.

130. Nelson, *supra* note 46, at 618.

131. Nelson, *supra* note 46, at 619.

identifies and derives two core values of section 2 from the language of the statute and the legislative history of its amendments: that (1) racial context matters and (2) implicit bias counts.¹³² Her *causal context* test is particularly supported by the Senate Factors, which clearly demonstrate that Congress intended for courts to evaluate behavior both within and outside the electoral arena when evaluating section 2 claims.¹³³ This is especially true of Senate Factor five, which the Supreme Court called the “essence of a section 2 claim”¹³⁴ and which explicitly asks if an electoral practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” Additionally, since recent studies of implicit bias within the law suggest that consideration of subconscious discrimination is indispensable to developing an accurate understanding of modern race dynamics in America,¹³⁵ Senate Factor five strongly supports the idea that incorporating evidence of implicit bias would be legally and historically consistent with past considerations of

132. Nelson, *supra* note 46, at 586 & n.28. Implicit bias theory can be summarized as “discriminatory biases based on implicit attitudes or implicit stereotypes.” See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006). By its very nature, implicit bias is not perceptible by the person perpetrating it. It operates as a subconscious influence on actions and decision making. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.” (footnote omitted)).

133. Nelson, *supra* note 46, at 597 (citing S. REP. NO. 97-417) (1982) (citing *White v. Regester*, 412 U.S. 755, 766–69 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff’d sub nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam)).

134. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

135. Nelson, *supra* note 46, at n.30 (citing IMPLICIT BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012) (chronicling how pervasive implicit racial attitudes and stereotypes perpetuate the continued subordination of historically disadvantaged groups in the legal system); see generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006) (investigating the possibility of using the law as a “de-biasing” tool to counter implicit bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (applying a social cognitive model of implicit bias to Federal Communications Commission regulations); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006) (advancing a theory of “behavioral realism” to identify discriminatory motives in Title VII disparate treatment cases); Lawrence III, *supra* note 132 (evaluating the doctrine of discriminatory purpose in light of the potential for implicit bias); Michael H. LeRoy, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, 95 IOWA L. REV. 1569 (2010) (examining how judicial elections impact courts’ review of arbitrator rulings in employment disputes); Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2009) (analyzing polling places as a site for implicit bias).

the impact of race in the electoral process.¹³⁶ As will be demonstrated, there are a total of three Senate Factors supporting this proposition.

Nelson points to three additional Senate Factors that also offer support for using evidence of implicit bias to prove racial discrimination both within and outside the electoral context for the purpose of establishing disparate vote denial.¹³⁷ Factor two looks for racially polarized voting, which simply means that the “race of voters correlates with the selection of a certain candidate or candidates.”¹³⁸ Courts have repeatedly found that evidence of racially polarized voting reveals a subtext of racial discrimination,¹³⁹ and thus, it may point to underlying implicit or explicit bias that may be used as contextual evidence. Senate Factor six invites evidence of “subtle racial appeals,”¹⁴⁰ which allows for the most obvious doorway for evidence of subconscious and non-explicit bias to enter the section 2 analysis. Finally, by inviting evidence regarding the “tenuousness” of a state’s interests behind a challenged election policy, Senate Factor nine “permits courts to attribute a pretext for discrimination to State action when the justifications are insufficient.”¹⁴¹ Since this pretext “does not necessarily result from explicit bias, but may well be the result of implicit bias that the weakness of the State’s justification reveals,”¹⁴² it also provides a clear opportunity for introducing evidence of implicit bias.

Using evidence of implicit bias in a causal context analysis also follows the precedent set by *Smith v. Salt River Project Agric. Improvement & Power*

136. Nelson, *supra* note 46, at 586.

137. Nelson, *supra* note 46, at 622.

138. Nelson, *supra* note 46, at 622 (citing Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1393 (2010) (quoting *Gingles*, 478 U.S. at 62 (plurality opinion))).

139. Nelson, *supra* note 46, at 623 (citing *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc) (rejecting the district court’s conclusion that to prove racially polarized voting, “plaintiffs need only demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting”); *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1554 (5th Cir. 1992) (noting that the inquiry into racially polarized voting “aims at determining whether it is racial voting patterns, along with other objective factors, rather than some other set of causes, that explain the lack of electoral success of voters within the protected class”).

140. S. REP. NO. 97-417, at 29 (1981-1982).

141. Nelson, *supra* note 46, at 624 (citing *Terrazas v. Clements*, 581 F. Supp. 1329, 1345 n.24 (N.D. Tex. 1984) (stating that “[t]he principal probative weight of a tenuous state policy is its propensity to show pretext”); *but see United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1571 (11th Cir. 1984) (stating that the Senate’s consideration of a non-tenuous state policy is among the least important of the factors for determining vote dilution).

142. Nelson, *supra* note 46, at 624–25.

Dist.,¹⁴³ that section 2 requires more than just statistical proof of disparate impact.¹⁴⁴ It may, in fact, come closer to creating an evidentiary standard that can provide a “direct causal link between state action and vote denial,” without requiring intentional discrimination, than pure statistically based evidence of disparate impact.¹⁴⁵ Evidence of implicit bias also “fits squarely”¹⁴⁶ within the Supreme Court’s constricted reading of the VRA in important cases such as *Shaw v. Reno*,¹⁴⁷ *Miller v. Johnson*,¹⁴⁸ and *Shaw v. Hunt*¹⁴⁹ by providing a missing link between external factors and internal impact.

The causal context test has been criticized, however, due to Nelson’s clear assertion that evidence of purposeful discrimination is not required to satisfy it.¹⁵⁰ In his article, *Applying Section 2 to the New Vote Denial*, Tokaji expresses a fear that Nelson’s test may set the bar for demonstrating causation too low for the current Court.¹⁵¹ On the other hand, the ability to present evidence of implicit bias is critically important to developing a fair legal standard for evaluating claims of vote denial due to a voter ID law. As demonstrated by a comprehensive report published by the Government Accountability Office, the well documented decreases in voter turnout attributable to implementation of voter ID laws are sharper among black voters than among whites.¹⁵² In an even more recent and much more

143. See, e.g., *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358–59 (4th Cir. 1989).

144. Cf. *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

145. *Id.* at 625.

146. *Ricci*, 557 U.S. at 626.

147. *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (holding that the complaint’s allegation that a redistricting plan was so extremely irregular on its face that it could only rationally be viewed as an effort to separate races for purposes of voting was a sufficient claim upon which relief could be granted).

148. *Miller v. Johnson*, 515 U.S. 900, 919 (1995) (stating that, compliance with traditional districting principles such as compactness, contiguity, and respect for political subdivisions cannot suffice to refute claims of racial gerrymandering when those factors were subordinated to racial objectives) (citations omitted).

149. *Shaw v. Hunt*, 517 U.S. 899, 912 (1996) (holding that state objectives other than race can be sufficient to overcome a claim that a redistricting plan fails to maximize minority representation).

150. Nelson, *supra* note 46, at 633.

151. Tokaji, *supra* note 28, at 467.

152. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 26, 48, 51–53 (Sept. 2014) (finding that: (1) turnout decreases in Kansas and Tennessee beyond decreases in the compared states were attributable to changes in the two states’ voter ID requirements; (2) the reduced voter turnout was sharper among people aged 18-23 than among those aged 44-53; (3) studies finding that blacks have a lower rate

comprehensive academic study, a significant drop in minority participation was consistently found when and where so-called “strict ID laws” are implemented.¹⁵³ Due to the importance of implicit bias in voter ID considerations evidenced by this research, it seems critical that elements of Nelson’s causal context test be incorporated into whatever test is eventually adopted as a universal standard for section 2 claims.

B. A Proper Standard for Evaluating Section Two Vote Denial Claims Should Incorporate Both Evidence of Implicit Bias and Consideration of State Interests

Any realistic proposed test for section 2 vote denial claims will need to incorporate the two-step test articulated by the Sixth Circuit in *Ohio State Conference of NAACP v. Husted*¹⁵⁴ that was followed by other federal courts. Additionally, since the current shape and direction of the Supreme Court suggests a resurgence in state sovereignty, it would also be prudent to allow state interests to play a prominent role in the analysis. The three-step test proposed by Tokaji, which accomplishes both of these goals, can thus serve as a workable template for a new test designed to also incorporate elements of Nelson’s causal context theory.

In the first step of Tokaji’s three-step test, the plaintiff “must show that the challenged standard, practice, or procedure causes a disproportionate burden on members of a protected class that an alternative standard, practice, or procedure would avoid.”¹⁵⁵ The first part of this step falls in line with Nelson’s threshold requirement that section 2 plaintiffs be able to demonstrate that the challenged practice or procedure has a “statistically significant”¹⁵⁶ disparate impact. Tokaji’s test then takes this slightly further by also inquiring as to whether there is an alternative practice that could avoid the disparate impact. This may be an important aspect of any section 2 vote denial claim regarding voter ID requirements, particularly in light of

of ID ownership than whites are reliable; and (4) reduced voter turnout among black voters was between two and four percent greater than among white voters in the studied states).

153. See generally *Voter Identification Laws and the Suppression of Minority Votes*, *supra* note 21; Zoltan L. Hajnal, et al., *Do Voter Identification Laws Suppress Minority Voting? Yes. We Did the Research.*, WASH. POST (Nov. 7, 2017) https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?utm_term=.d0429206d6a3. States with “strict voter ID laws” are defined as states where residents cannot vote without presenting valid identification during or after the voting process.

154. *Ohio State Conf. of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio), *aff’d*, 768 F.3d 524 (6th Cir. 2014), *stay granted*, 135 S. Ct. 42 (2014), *vacated sub nom*; *Ohio State Conference of the NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

155. Tokaji, *supra* note 28, at 474.

156. Nelson, *supra* note 46, at n.202.

the proven history that some state statutes were very specifically crafted in regard to types of ID that would be accepted at the polls.¹⁵⁷ By requiring that no alternative standard, practice, or procedure would avoid a disparate impact, this test will also allow for any pertinent demonstration of specifics regarding the types of IDs that were chosen as acceptable.

The second step of Tokaji's test demonstrates where Nelson's causal context approach can best be incorporated. In Tokaji's second prong, the plaintiff "must show that the disproportionate burden is traceable to interaction of the challenged standard, practice, or procedure with 'social and historical conditions' that have produced or currently produce discrimination against members of the protected class."¹⁵⁸ This is remarkably similar to Nelson's causal context approach, which asks for a showing that the disparate impact of a law or practice is "because of racial inequality inside or outside the electoral arena" that "interacts with the practice to reproduce racial disparities within the electoral arena."¹⁵⁹ In fact, Tokaji agrees with Nelson that the Senate Factors "are mainly targeted at rooting out racial bias . . . that might infect the electoral process," and that racial polarization is relevant to a vote denial inquiry because it may suggest "a motivation for the state to limit a racially defined group's voting opportunities."¹⁶⁰ He further agrees that Senate Factor five's investigation into whether racial minorities "bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process"¹⁶¹ is especially relevant and of "special importance" to vote denial claims.¹⁶²

As a result of this substantial agreement and the compelling necessity to create a standard under which evidence of implicit bias may be introduced, some modification of Tokaji's second step to incorporate language from Nelson's suggested test will be necessary. This could be accomplished any number of ways, but one may be as follows: "Plaintiffs must show that the disparate burden created by the challenged standard, practice or procedure is traceable to 'social and historical conditions' inside or outside the electoral

157. North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016) (citing 2016 WL 1650774 at *142; J.A. 3653, 2115, 2291–92).

158. Tokaji, *supra* note 28, at 474.

159. Nelson, *supra* note 46, at 618.

160. Tokaji, *supra* note 28, at 481.

161. S. REP. NO. 97-417, at 29 (1981-1982).

162. Tokaji, *supra* note 28, at 481–82.

arena that interact with the practice to reproduce disproportionate burdens inside the electoral arena.”¹⁶³

This proposed second step incorporates language from both Tokaji and Nelson’s tests, stressing that the disparate/disproportionate burden may largely be the result of factors outside the electoral arena and thereby provide a more explicitly welcoming legal environment for evidence of implicit bias and wider contextual factors.

By altering the second step of the analysis in this manner, voting rights advocates will see no harm in including Tokaji’s proposed third step. This would allow the State, once steps one and two are satisfied by the plaintiff(s), to have an opportunity to “show by clear and convincing evidence that the burden on voting is outweighed by the state interests in the challenged standard, practice or procedure.”¹⁶⁴ In fact, this would help alleviate any concern that the test sets the bar for demonstrating causation too low for the current Court.¹⁶⁵

Put together, the proposed standard which combines Tokaji and Nelson’s proposals might read as follows:

1. Plaintiff must show that the challenged standard, practice, or procedure causes a statistically significant disparate burden on members of a protected class that an alternative standard, practice, or procedure would avoid;
2. Plaintiffs must show that the disparate burden created by the challenged standard, practice or procedure is traceable to ‘social and historical conditions’ inside or outside the electoral arena that interact with the practice to reproduce disproportionate burdens within the electoral arena;
3. If the plaintiffs satisfy (1) and (2), then the defendants must show by clear and convincing evidence that the burden on voting is outweighed by the state interests in the challenged standard, practice, or procedure.

IV. Consequences of Voter ID Laws

The loss of section five preclearance requirements and subsequent failure to adopt an adequate standard for evaluating vote denial claims under section 2 has had an undeniable impact on recent American elections.

163. See Tokaji, *supra* note 28, at 474; see also Nelson, *supra* note 46, at 618.

164. Tokaji, *supra* note 28, at 474.

165. See Tokaji, *supra* note 28, at 467.

Immediately after the *Shelby* decision in 2013, many states previously subject to section 5 preclearance requirements went forward with implementing proposed changes. Most notably for the 2016 election, both Florida and North Carolina proceeded with significant changes to their election laws and voter registration rolls.¹⁶⁶ The failure to adopt a standard to adequately protect voters prior to the implementation of North Carolina's strict new voter ID requirements, elimination of same-day voter registration, shortening of the early voting period by seven days, and new specification that ballots cast at the wrong polling station would be thrown away, led to allegations of wide-spread voter suppression and denial.¹⁶⁷ In Florida, the State resumed plans to remove non-citizens from voter registration rolls using the federal Systematic Alien Verification for Entitlements ("SAVE") database.¹⁶⁸ While this effort was found in violation of the National Voter Registration Act well in advance of the 2016 election,¹⁶⁹ there were still enough problems with the State's voter rolls that a federal judge had to intervene in late October of 2016.¹⁷⁰ Both of these states were ultimately won by very slim margins,¹⁷¹ meaning that even seemingly minor vote denial potentially had a large impact.

While many studies have been produced to demonstrate the *potential* for voter ID laws to have a disproportionate impact on minority voters, only recently has election data been available to definitively assess their impact.¹⁷² The first comprehensive study of voter ID laws to use a large sample of validated voting data from multiple elections now unequivocally

166. See Lopez, *supra* note 20.

167. See Jason Mast & Benjamin Din, *In North Carolina, A Battle Over Voter Suppression*, US NEWS (Oct. 30, 2016), <https://www.usnews.com/news/national-news/articles/2016-10-30/in-north-carolina-a-battle-over-voter-suppression>; Pete Williams, *Judge Says North Carolina Illegally Purged Voter Lists*, NBC NEWS (Nov. 4, 2016), <https://www.nbcnews.com/storyline/2016-election-day/judge-says-north-carolina-illegally-purged-voter-lists-n677431>.

168. See Ashley Lopez, *Florida Secretary of State Prepares New Voter Purge*, FLORIDA CTR. FOR INVESTIGATIVE REPORTING (Aug. 6, 2013), <http://fcir.org/2013/08/06/rick-scott-voter-purge/>.

169. See Eric Lach, *Appeals Court Finds Florida's 2012 Voter Purge Broke the Law*, TALKING POINTS MEMO (Apr. 1, 2014), <http://talkingpointsmemo.com/muckraker/florida-voter-purge-appeals-ruling>.

170. See Zachary Roth, *Election 2016: Tracking Reports of Voting Problems Across the United States*, NBC NEWS (Nov. 7, 2016), <https://www.nbcnews.com/storyline/2016-election-day/election-2016-tracking-reports-voting-problems-across-united-states-n673236>.

171. Florida was won by only 112,911 votes, and the state of North Carolina by a mere 173,315 votes. See *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES, <https://www.nytimes.com/elections/results/president> (Sept. 22, 2017).

172. See *Voter Identification Laws and the Suppression of Minority Votes*, *supra* note 21, for examples of these previous studies.

demonstrates a disproportionate suppression of minority votes. Using a sample size of over three hundred thousand Americans, researchers were, for the first time, able to analyze the participation of racial minorities both before and after the implementation of strict ID laws.¹⁷³ While overall turnout in states with voter ID laws was not significantly different than in states without these laws, a consistent and significant drop in minority participation was found at the point when and in jurisdictions where such laws were implemented.¹⁷⁴

The new study shows indisputable proof that a gap between white and minority voter turnout, the improvement in which Chief Justice Roberts cited in his rationale for striking down section 4(b),¹⁷⁵ is resurging in states with strict voter ID laws.¹⁷⁶ In general elections, the study found that the average gap between white and Latino turnout was 4.9 points in states without strict voter ID laws. In states with strict voter ID laws, this difference grew to 13.2 points.¹⁷⁷ The gap between white turnout and both Asian-American and African-American turnout also increases in this comparison, and even more notably in primary elections.¹⁷⁸ Where a state has strict voter ID requirements, the gap in turnout between white and black voters in primary elections grows from 2.5 to 11.6.¹⁷⁹ This is indisputable evidence that, left unchecked through either the judicial system or the VRA's statutory scheme, the very progress that was used to overturn section 4(b) is now being undercut by state implementation of voter ID laws.

Without a legislative fix to the section 4(b) formula to reinstitute preclearance requirements for jurisdictions with a history of voter discrimination, the ability to seek injunctive relief and immediate stays of State action under section 2 is the sole remaining protection against the vote denial and suppression efforts still underway. Adopting a fair and universal judicial standard for evaluating claims under that provision, such as the one offered by this Note, is of paramount importance to America's democratic integrity and form of representative government.

173. See Hajnal et al., *supra* note 153.

174. Hajnal et al., *supra* note 153.

175. See *supra* notes 14–15 and accompanying text.

176. See Hajnal et al., *supra* note 153.

177. Hajnal et al., *supra* note 153.

178. Hajnal et al., *supra* note 153.

179. Hajnal et al., *supra* note 153.

Conclusion

Voter ID laws are eroding the very progress that led to the Supreme Court's decision to strike down section 4(b) of the VRA in *Shelby County v. Holder*.¹⁸⁰ It is clear, however, that section 2 is still a viable option for challenging these laws and an effective legal tool for vote denial claims. Adopting a standard for evaluating section 2 vote denial claims that combines the two-step test of *Ohio State Conference of NAACP v. Husted*,¹⁸¹ a method for introducing evidence of implicit bias, and a mechanism for demonstrating that state interests outweigh any burdens placed on voting, offers all interested parties a fair opportunity to present their best argument. Given the paramount importance of the right to vote in a democratic society, and particularly one that considers itself an example for the world, it is only appropriate to afford both sides of any vote denial claim the chance to present the best argument they can make. The standard proposed in this Note would not only give voters full protection from disproportionate burdens that result from outside discriminatory factors interacting with facially neutral laws, but it would also allow for states to work towards legitimate interests in election integrity. In the modern environment of contested election results and proven increases in the gap between white and minority voter participation, this test has the potential to achieve the difficult balance of offering both sides a full opportunity to be heard while simultaneously protecting the right to vote during necessary election modernization efforts.

180. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2626 (2013).

181. *Ohio State Conference of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *stay granted*, 135 S. Ct. 42 (2014), *vacated sub nom*; *Ohio State Conference of the NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).